FILE COPY

Office - Supreme Court, U. S.
DEC 18 1946
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1946

No. 206

EUGENE KOSTER,

Petitioner,

vs.

(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER

JULIUS LEVY,
Counsel for Petitioner.

WILLIAM E. HAUDEK,
on the Brief.

INDEX

PAGE

POINT I—The venue statute gives petitioner the absolute right to bring this action in the district of his residence 1

POINT II—Institution of this suit in the Eastern District of New York was neither vexatious nor oppressive 3

POINT III—Under the law of New York the jurisdiction of the court would be mandatory 4

CASES CITED

Atkins v. Fiber Disintegrating Co., 18 Wall. (85 U. S.) 272 (1874) 2

Baltimore & Ohio R. Co. v. Kepner, 314 U. S. 44 (1941) 2

Canada Malting Co. v. Paterson Steamship, Ltd., 285 U. S. 413 (1932) 2

General Investment Co. v. Lake Shore & M. S. R. Co., 260 U. S. 261 (1922) 1

Goldstein v. Lightner, 266 App. Div. 357, aff'd 292 N. Y. 670 (1944) 4

Massachusetts v. Missouri, 308 U. S. 1 (1939) 2

Meredith v. Winter Haven, 320 U. S. 228 (1943) 2

Norton's Settlement, In re (1908), 1 Ch. 471 3

Pennsylvania v. Williams, 294 U. S. 176 (1935) 2

Rogers v. Guaranty Trust Co., 288 U. S. 123 (1933) 1

Williams v. Green Bay & W. R. Co., 326 U. S. 549 (1946) 1, 3

Supreme Court of the United States

OCTOBER TERM, 1946

No. 206

EUGENE KOSTER,

Petitioner,

vs.

(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER

POINT I

The venue statute gives petitioner the absolute right to bring this action in the district of his residence.

1. Respondent's authorities (Br., p. 7) do not militate against this proposition, since none of those cases involved the impact of the federal venue legislation upon the doctrine of *forum non conveniens*.

Williams v. *Green Bay & W. R. Co.*, 326 U. S. 549 (1946), was not an original federal court suit; it had been removed from the State to the Federal Court (326 U. S., at 550-1). *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123 (1933), likewise had been removed from the State to the Federal Court (288 U. S., at 124). Hence, in both cases, the venue statute was by its very terms inapplicable, *General Investment Co.* v. *Lake Shore & M. S. R. Co.*, 260 U. S. 261, at 274-9 (1922).

Canada Malting Co. v. *Paterson Steamship, Ltd.*, 285 U. S. 413 (1932), was an admiralty suit. Admiralty cases are not governed by any venue statute, *Atkins* v. *Fiber Disintegrating Co.*, 18 Wall. (85 U. S.) 272 (1874).

Massachusetts v. *Missouri*, 308 U. S. 1 (1939), involved the original jurisdiction of this Court. The case in no way involved the venue statute which relates only to actions instituted in district courts. This Court was, however, careful to point out that *forum non conveniens* is only "applicable to particular classes of cases" (308 U. S., at 19) (Our Main Brief, pp. 10-13).

Even more remote is *Pennsylvania* v. *Williams*, 294 U. S. 176 (1935), which resolves a conflict of jurisdiction between a Federal court receivership and a duly authorized and empowered state administrative agency. No question of venue was involved.

Respondent's last case, *Meredith* v. *Winter Haven*, 320 U. S. 228 (1943), hardly helps it; for there it was held that the necessity of resolving difficult questions of state law does not justify a federal court in declining jurisdiction.

Thus, in none of the above cases, was this Court confronted with the problem at bar—whether the *forum non conveniens* doctrine could be superimposed upon the statutory venue requirement.

2. Respondent would distinguish *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U. S. 44 (1941), on the ground that it involved a federal statute which, in creating a right of action, created also a special venue privilege. But the character of the right asserted has no bearing on the nature and scope of the venue privilege. This was recognized in the dissenting opinion of Mr. Justice Frankfurter, 314 U. S., at 62:

> "If the privilege afforded a plaintiff to bring suit under the Employers' Liability Act in one place rather than in another is to be regarded as an absolute command to the federal courts to take jurisdiction regardless of any considerations of justice and fairness, why

is not the same effect to be given the comparable general venue provisions of § 51 of the Judicial Code, 28 USCA § 112? Nothing in the language or the history of the venue provision of the Act differentiates it from the numerous other venue provisions of the Judicial Code."

POINT II

Institution of this suit in the Eastern District of New York was neither vexatious nor oppressive.

1. Respondent enumerates a long list of factors indicating that the trial of this action in Illinois, rather than in New York, would greatly serve respondent's convenience. However, even if it were assumed that the district court had power to decline jurisdiction of an action brought in the proper venue, still the convenience of a litigant is not one of the elements by which the Court's discretion may be guided.

Only a "vexatious or oppressive" choice of forum may justify a district court in rejecting jurisdiction, *Williams* v. *Green Bay & W. R. Co.*, 326 U. S., at 554, 559. A finding of "vexatious or oppressive" presupposes bad faith. Mere expense or inconvenience to the respondent is not sufficient (Our Main Brief, pp. 16-20). Respondent's brief altogether fails to show that it would be "very difficult or practically impossible" for it "to get justice" in New York (see *In re Norton's Settlement* [1908], 1 Ch. 471, at 479).

2. Going beyond the record, respondent (Br., pp. 13, 14) refers to an action (*Schwartz* v. *Kemper et al.*) now pending in the North District of Illinois, for substantially the same relief, as an additional ground to defeat jurisdiction of this action.

We submit that this appeal should be decided solely on the record created before the district court. In any event,

however, the pendency of the *Schwartz* action in Illinois would seem quite immaterial. The *Schwartz* suit was instituted long after that at bar, in fact long after the District Court's decision herein. The District Court's jurisdiction, if properly invoked initially, could not subsequently be divested by a later suit of another policy holder. And it should be noted that the only real defendant served with process herein, the James S. Kemper & Co., Inc. (R. 1), is not even named as a defendant in the *Schwartz* suit.

POINT III

Under the law of New York the jurisdiction of the court would be mandatory.

The cases cited in our main brief (7) clearly sustain that proposition. Respondent (Br., pp. 14-15) would distinguish those authorities on the ground that in each case cited by us, jurisdiction was retained either because the corporation's principal place of business or its financial domicile was in New York, or because all or a substantial part of its property was located there, or because most of the officers and directors were within the jurisdiction.

This contention is refuted by *Goldstein* v. *Lightner*, 266 App. Div. 357, aff'd 292 N. Y. 670 (1944). That case was an action by a stockholder of a New Jersey corporation. The complaint, as appears from the record on appeal, stated two causes of action. The first, derivative in character, sought to recover from the corporate directors the damages which the corporation had sustained by reason of unauthorized investments of its funds and excessive salary payments. The second cause of action, representative in character, sought to compel the declaration of a dividend out of the corporation's accumulated surplus. The Court held that the second cause of action involved the internal affairs of a foreign corporation and was there-

fore subject to dismissal. But otherwise as to the first cause of action:

> "• • • there was no justification for the dismissal of the first cause of action, which is a derivative suit in behalf of the corporation, to recover from defendant directors of a foreign corporation damages for the breach of their fiduciary duty resulting in waste of the corporate assets. To this cause of action the doctrine of forum non conveniens does not apply. Cuppy v. Ward, 187 App. Div. 625, 632, 176 N. Y. S. 233, affirmed 227 N. Y. 603, 125 N. E. 915; Hamm v. Christian Herald Corporation, 236 App. Div. 639, 642, 260 N. Y. S. 743; Weinstein v. Aeolian Company, 243 App. Div. 355, 356, 277 N. Y. S. 230."

Thus, the nature of the claims asserted—not the amount of corporate activity in the jurisdiction—determines whether an action involves a corporation's internal affairs. The law of New York is clear: A derivative action for breaches of fiduciary duty does not involve the internal affairs of a foreign corporation; a New York court cannot refuse jurisdiction on the basis of *forum non conveniens*.

Respectfully submitted,

JULIUS LEVY,
Counsel for Petitioner.

WILLIAM E. HAUDEK,
on the Brief.

Dated: New York, N. Y., December 16, 1946.